FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 12 1959
JAMES R. BROWNING, Clerk

No. 697

In the Supreme Court of the United States

October Term, 1958

JOSEPH D'AGOSTINO, CLAIMANT OF ONE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Nocita v. *United States*, 258 F. 2d 199	8
United States v. *Currency*, 157 F. Supp. 300	8
United States v. *General Motors Acceptance Corp.*, 239 F. 2d 102	8
United States v. *Lane Motor Co.*, 344 U.S. 630	8
United States v. *$1,508.40*, 158 F. Supp. 916	8
United States v. *One 1957 Ford Tudor Fairlane Victoria*, 161 F. Supp. 232	8
Voglino v. *United States*, 253 F. 2d 794, certiorari denied, 357 U.S. 919	8

Statutes:

Internal Revenue Code of 1939:	
Sec. 3116 (26 U.S.C. 3116)	8
Internal Revenue Code of 1954:	
Sec. 7302 (26 U.S.C., Supp. V, 7302)	2, 7, 8

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess.	8
S. Rep. No. 1622, 83d Cong., 2d Sess.	8

In the Supreme Court of the United States

October Term, 1958

No. 697

JOSEPH D'AGOSTINO, CLAIMANT OF ONE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A.) is reported at 261 F. 2d 154. The findings of the District Court (Vol. I, pp. 15-18)[1] are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958. The petition for a writ of

---

[1] The record filed by claimant consists of 3 volumes separately numbered. Volume II is the transcript of the forfeiture hearing and will be referred to by the prefix "Tr.". All other references will be to volume and page.

certiorari was filed on February 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a car used in the actual conduct of a gambling business for which required federal tax stamps had not been obtained may be forfeited under the provisions of Section 7302, Internal Revenue Code of 1954.

2. Whether there was sufficient evidence to warrant forfeiture of petitioner's car as having been used to violate the internal revenue laws.

STATUTE INVOLVED

Section 7302 of the Internal Revenue Code of 1954 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the dispositiion of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those

hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

STATEMENT

The United States filed a libel for the seizure of a Lincoln car on the ground that it "had been used unlawfully to further violations" of the Internal Revenue Code by Joseph D'Agostino (petitioner) in receiving wagers without applying for a wagering permit or paying the wagering occupational tax (Vol. I, pp. 2-3). Petitioner made claim to the car and the forfeiture was set for hearing (Vol. I, pp. 7-14). The evidence may be summarized as follows:

Joseph S. Deiro, Los Angeles policeman, related that on February 27, 1957, he had arrested petitioner's brother for bookmaking in petitioner's apartment (Tr. 7-8). Later that day he had a conversation with petitioner, who requested the "betting markers" and "owe-sheets" which had been seized as evidence. Petitioner told Deiro "that it was his book, and that all he was interested in was getting a copy * * *" (Tr. 9). Petitioner gave Deiro $100 (Tr. 8) and they agreed to meet the next day, February 28, 1957 (Tr. 10).

The following day, Deiro again met petitioner. They had a short conversation about petitioner's bookmaking activities and petitioner made copies of the betting markers and owe sheets (Tr. 10).

Almost immediately thereafter, petitioner was arrested on state charges in the Lincoln car where he

had the copied betting markers. He was arrested by another policeman, Ira B. Dole (Tr. 18, 21). Dole testified to a conversation with petitioner, in part as follows (Tr. 19):

> In substance he related that he used the car to make weekly visits to his bettors where he would either pay or collect the amounts won or lost from them, and that on one occasion he would make a weekly visit to an agent who had three or four or five accounts, and he would either pay or collect the amounts won or lost from this agent.
>
> He stated that he used his Lincoln automobile —in substance, stated that he used his Lincoln automobile that is in question here to transport himself for this purpose.

The government, on rebuttal, also produced Policeman Charles M. Holmes of the Los Angeles police force, who corroborated the second meeting between policeman Deiro and petitioner and related further conversations in which petitioner admitted his bookmaking activities (Tr. 69-73).

Further rebuttal evidence consisted of a tape recording of the interview between petitioner and the officers at the Police Building. The government stated (Tr. 75):

> * * * and in this recording there are admissions against interest which are made on the part of Mr. D'Agostino.

After a foundation for its admission had been established (Tr. 78-81), the original tape was played without objection (Tr. 83-111). The following ex-

cerpt is from the questions and answers recorded (Tr. 104-105):

> Q. I see. In other words, then you take your car and you go around to each one of your bettors on a weekly basis?
>
> A. On a weekly basis.
>
> Q. On Mondays?
>
> A. Yah, Mondays and Tuesdays.
>
> Q. You have to make one trip a week in your car to all your bettors to—
>
> A. I'll—
>
> Q. BY SGT. DOLE: That's where you've been going when we've been following you whenever you've been driving that Lincoln, huh?
>
> A. (*) I didn't know you were following (*)[2].
>
> Q. BY SGT. LIEVAN: Put it another way, if we had been following you on Mondays, we'd have seen you go to all your bettors; right?
>
> A. That's right. Monday and Tuesday, with the exception— I'll be honest with you, with the exception of Thursday night, I straighten up one account down at the fights. He's got four or five customers.

It was stipulated that petitioner was the registered owner of the seized Lincoln and that he did not possess a Federal Wagering Tax Stamp (Tr. 3).

Petitioner was called to the stand by the government and he also testified for himself. He stated that the Lincoln in question was the only car he owned (Tr. 39), but he denied using it to make weekly calls

---

[2] The record (Tr. 82-83) states that the asterisk indicates unintelligible conversation.

on his bettors (Tr. 39). He denied that he had any interest in his brother's bookmaking activities and claimed that he wanted a copy of the sheets "for my brother" (Tr. 58).

Petitioner called as a witness Carl Anthony Landi, who claimed that petitioner was his partner in the clothing business and "supervises our pressing department to give us the kind of quality and production that we need * * *." Landi claimed that during the time he was present in the automobile he did not see Mr. D'Agostino "receive any wagers on any horses" and that petitioner got out of the car to copy something in the police car (Tr. 50-53).

The District Court ruled (Tr. 123-124):

> * * * I think if the entire background is considered, along with his admissions made to the officers at the time, which he denied on the stand to have made, but which he repeated in effect before the police officers, that it was his operation, is sufficient to show that this automobile was used in carrying on at or about that time illegal operations, and it wasn't necessary to find an illegal ticket, or anything which is declared in itself to be contraband, because if that were true, you could never convict a man for using an automobile to carry on these activities, because even if you overheard the conversation whereby he was taking the bet, you would still have to have something concrete, and in making bets there is nothing concrete, and merely a promise is made, a promise to place a bet, which is paid off later on.

In granting the forfeiture, the trial judge entered findings of fact including the following (Vol. I, p. 16):

> That prior to and on or about February 28, 1957 said automobile had been used by said Joseph D'Agostino in receiving wagers without filing application for wagering permit and without payment of the wagering occupational tax, with intent to defraud the United States of the said taxes, and in violation of Sections 4411 and 4412, Title 26, United States Code.

The Court of Appeals unanimously affirmed the judgment of forfeiture. It agreed with the trial court that the evidence was sufficient and held that the statute was neither unconstitutional nor unconstitutionally applied (Vol. III, pp. 6-8).

ARGUMENT

1. In this Court, petitioner confines his argument to the question whether Section 7302 supports the forfeiture of the automobile, arguing that Congress has nowhere made it explicit than an automobile is subject to forfeiture for violations of an occupational tax. Section 7302, *supra*, p. 2, states, however, that it "shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws." The words "any property" are all-inclusive and the legislative history shows that the section was intended to be as broad as its terms. Section 7302 was derived from Section 3116 of the Internal Revenue Code of 1939 which had made it unlawful to "possess any liquor or property intended for use in violating the provisions of this part or

the internal-revenue laws." The elinination in the 1954 Code of the specific reference to liquor was for the purpose of making clear that the provision would apply to articles used to commit other violations of the Code. The House and Senate reports [3] both state:

> This section contains no material change from existing law. The language of the section has been changed slightly in order to make clear that its provisions have general application under this title.

At the time the section was enacted, Congress was informed of the understanding of the Internal Revenue Service that the section would be applied to property used in violation of the gambling tax. See discussion of the legislative history in *United States* v. *One 1957 Ford Tudor Fairlane Victoria*, 161 F. Supp. 232, 233 (D. Md.). Since enactment of Section 7302, it has consistently been held applicable to property used in violation of the gambling tax laws. *United States* v. *General Motors Acceptance Corporation*, 239 F. 2d 102 (C.A. 5); *Voglino* v. *United States*, 253 F. 2d 794 (C.A. 4), certiorari denied, 357 U.S. 919; *Nocita* v. *United States*, 258 F. 2d 199 (C.A. 9); *United States* v. *One 1957 Ford Tudor Fairlane Victoria*, 161 F. Supp. 232 (D. Md.); *United States* v. *$1,508.40*, 158 F. Supp. 916 (S.D. Ill.); *United States* v. *Currency*, 157 F. Supp. 300 (N.D. N.Y.).

Petitioner's reliance upon *United States* v. *Lane Motor Co.*, 344 U.S. 630, is misplaced. There, the car was used only to commute to the illegal still.

---

[3] H. Rep. No. 1337, 83d Congress, 2d Sess., p. A 429; Sen. Rep. No. 1622, 83d Congress, 2d Sess., p. 608.

Here, by petitioner's own admission, the car was used directly in conducting his wagering business. It thus was an integral part of the very business which produced the fraud on the government revenue.

2. Petitioner raises but does not argue questions as to the sufficiency of the evidence. They are without merit. He admitted that he used the automobile in the actual operation of his gambling business. Petitioner's admissions were corroborated by the fact that his brother was arrested for bookmaking in petitioner's apartment, and betting markers and owe sheets found in petitioner's apartment were copied by petitioner and were in the car when he was arrested.

As against this persuasive evidence, there was only petitioner's denial and the statements of his "partner" that during the short period he was with him he "didn't see Mr. D'Agostino receive a bet" (Tr. 54). The trial judge, as trier of the facts, had more than sufficient evidence to sustain his findings.

Petitioner also tenders the question, "[w]hether evidence introduced for impeachment purposes may be used as a basis for a forfeiture" (Pet. 5). But Officer Dole testified to petitioner's admissions (Tr. 19) as part of the direct case. Thus, there was ample evidence to sustain the forfeiture even without reliance on the tape recordings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

MARCH 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 499995 1145